No. 93-714

In The

Supreme Court of the United States

October Term, 1993

U.S. BANCORP MORTGAGE COMPANY,

Petitioner,

v.

BONNER MALL PARTNERSHIP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT

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59pp

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

This case presents the important question of who controls the precedential effect of federal court decisions when litigants settle their cases on appeal – the courts or parties to the settled litigation. In this case, Petitioner U.S. Bancorp Mortgage Company ("U.S. Bancorp") unilaterally seeks to vacate a published decision of the United States Court of Appeals for the Ninth Circuit that resolved an important and often litigated question of bankruptcy law. U.S. Bancorp contends that because it voluntarily settled the underlying dispute while this case was pending before the Court on certiorari, U.S. Bancorp has the right to demand vacatur of the Ninth Circuit's published decision so as to negate its precedential value. Although the litigation in this case has been resolved, U.S. Bancorp believes the Ninth Circuit's precedent may be contrary to its interests as a creditor in future chapter 11 cases in that circuit.

This case stems from U.S. Bancorp's unsuccessful motion to obtain relief from the automatic stay[1] in a chapter 11 case filed by Respondent Bonner Mall Partnership ("Bonner Mall"). U.S. Bancorp sought relief from the automatic stay in order to foreclose on a shopping center owned by Bonner Mall that secured loans U.S. Bancorp had made to the partnership. The United States Bankruptcy Court for the District of Idaho granted U.S. Bancorp's motion based on its conclusion that a plan of reorganization Bonner Mall had filed could not be confirmed over U.S. Bancorp's objection because the plan

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[1] *See* 11 U.S.C. § 362.

proposed to distribute equity to Bonner Mall's partners in accordance with the "new value principle." J.A. 29. Under the new value principle, holders of equity interests (such as partners or shareholders) may receive or retain equity in the reorganized debtor under a plan of reorganization, even when creditors are not paid in full, by contributing new value in the form of cash or cash equivalents in an amount reasonably equivalent to the value of the equity interest to be received or retained. The Bankruptcy Court held that the provisions in the Bankruptcy Code requiring a nonconsensual plan to be "fair and equitable"[2] as to each class of creditors that rejects the plan precluded confirmation of "new value" plans. Notably, *the Bankruptcy Court's decision was on a pure issue of law, see* Petr. Brief 41, and the Bankruptcy Court made no factual findings adverse to U.S. Bancorp.

The United States District Court reversed the Bankruptcy Court's order authorizing relief from the automatic stay. Petr. App. A90-117 & A88-89 (reported at 142 B.R. 911). The Court of Appeals for the Ninth Circuit affirmed the District Court's reversal in a published opinion concluding that the new value principle, recognized by the Supreme Court as early as 1926, *see Kansas City Ry. v. Central Union Trust Co.*, 271 U.S. 445 (1926), facilitates Congress' goal of reorganization and is consistent with the requirements of the Bankruptcy Code. Petr. App. A1-84 (reported at 2 F.3d 899). The Ninth Circuit's decision resolves an important question that was litigated vigorously by the parties in the courts below and that has

[2] *See* 11 U.S.C. § 1129(b).

spawned litigation in numerous other bankruptcy cases, both in the Ninth Circuit and elsewhere.

The Court granted certiorari in this case originally to consider the legal issue whether the new value principle survived enactment of the Bankruptcy Code. U.S. Bancorp and Bonner Mall subsequently consummated a settlement, pursuant to which Bonner Mall confirmed a consensual plan of reorganization (the "Consensual Plan") that did not have to rely upon the new value principle.[3] The settlement was silent as to its effect on the decisions below. Bonner Mall advised the Court of the settlement and filed a brief suggesting the case be dismissed consensually pursuant to Supreme Court Rule 46.1. U.S. Bancorp concurred that the case was moot, but

[3] U.S. Bancorp intimates in its Statement of the Case and throughout its Brief that the Consensual Plan was heavily weighted in its favor, thus implying that it was Bonner Mall, not U.S. Bancorp, that "settled" this case. *See* Petr. Brief 8-9. The Solicitor General goes so far as to state that Bonner Mall "retreated dramatically" from its earlier positions. S.G. Brief 27. U.S. Bancorp and the Solicitor General are wrong. The Consensual Plan represents a fair compromise between U.S. Bancorp and Bonner Mall that the Bankruptcy Court approved as being in the "best interests" of Bonner Mall's creditors and equity holders. The Consensual Plan is attractive to Bonner Mall for a number of reasons, including: (i) the Consensual Plan provides for payment of U.S. Bancorp's claims over 60 months, while the original plan required payment within 32 months; (ii) the interest rate to be paid to U.S. Bancorp is fixed at 8 3/4% for the entire term, a very favorable rate given the type of loan, the risks involved, and the relative scarcity of real estate financing; and (iii) the Consensual Plan validates Bonner Mall's use of approximately $1.3 million in U.S. Bancorp's "cash collateral" during the case.

also unilaterally requested for the first time that the decisions below be vacated in light of the settlement, purporting to rely on the Court's decision in *United States v. Munsingwear*, 340 U.S. 36 (1950). Bonner Mall objected to vacatur because the vacatur practice established in *Munsingwear* applies only to cases rendered moot due to circumstances beyond the parties' control, not to cases rendered moot due to voluntary settlements. The Court did not vacate as U.S. Bancorp requested, but instead ordered the parties to brief the question whether the rule announced in *Munsingwear* should be extended to cases that become moot while pending before the Court because of the voluntary settlement of the parties.

SUMMARY OF THE ARGUMENT

The Court's established practice is to dismiss a case that becomes moot while pending before the Court on appeal or certiorari. When mootness is caused by circumstances beyond the parties' control, the Court also vacates the trial and appellate court decisions in order to prevent the parties from suffering the preclusive effects of decisions rendered unreviewable due to "happenstance". *See Munsingwear*, 340 U.S. at 40.

U.S. Bancorp asks the Court to extend its vacatur practice announced in *Munsingwear* to cases, such as this, that become moot due to a voluntary settlement, a circumstance that is entirely within the parties' control. U.S. Bancorp seeks such an extension in order to negate the precedential effect of the Ninth Circuit's published opinion that resolved an important issue of bankruptcy law.

The Court should decline U.S. Bancorp's unilateral request to vacate the decisions below in light of (i) the rationale underlying the Court's prior decisions on vacatur, (ii) U.S. Bancorp's lack of standing to seek vacatur, (iii) the important policy considerations favoring the preservation of judicial precedent and the protection of precedent from manipulation, (iv) the utility of encouraging settlements at the trial court level, and (v) the importance of collateral estoppel to the judicial system. In the event the Court adopts a case-by-case approach to vacatur, the Court should not vacate the decision below based on the particular facts and circumstances of this case.

In *Munsingwear*, the Court made clear that its long-standing practice of vacating lower court decisions when a case becomes moot while pending before the Court on appeal or certiorari applies only when mootness is due to "happenstance", such as a change in the law governing the dispute. Such circumstances beyond the litigants' control render the lower courts' decisions unreviewable through no fault (and indeed no voluntary action) of the parties. The Court reasoned that it would be unfair to allow a decision rendered moot due to circumstances beyond the parties' control to have a *preclusive* effect in future litigation *between the parties* when mootness denies the party that lost below an opportunity for appellate review. In contrast, the Court expressed no concern as to the *precedential* effect of a decision in a case rendered moot, as to either the litigants or third parties. Nor did the Court express concern as to either the preclusive or precedential effects of a decision in a case rendered moot due to circumstances other than "happenstance."

The Court further defined the limits of its vacatur practice in *Karcher v. May*, 484 U.S. 72 (1987). In *Karcher*, the Court denied a request to vacate lower court decisions when a case before the Court had become moot due to the voluntary decision of the party who suffered an adverse judgment below to abandon prosecution of its appeal. Relying on its *Munsingwear* rationale of preventing prejudice due to "happenstance", the Court emphasized that mootness in this instance was not the result of circumstances beyond the control of the parties. *Id.* at 83. Because the fairness considerations at issue in *Munsingwear* were not present in *Karcher*, the Court declined to extend its vacatur practice to cases rendered moot due to the voluntary actions of the parties.

In light of U.S. Bancorp's voluntary agreement to the settlement, the vacatur issue in this case is indistinguishable from that addressed in *Karcher*. Both here and in *Karcher*, mootness resulted not from "happenstance", but from a voluntary decision by the party suffering an adverse judgment not to pursue its appeal before this Court. Thus, as in *Karcher*, vacatur is not appropriate here. The overwhelming majority of the federal Courts of Appeal that have considered the issue concur that vacatur is not appropriate in cases, such as this, that voluntarily settle on appeal, but rather only when the circumstances rendering the case moot are beyond the appellant's control.

Sound constitutional and policy considerations militate against extending the practice of vacatur to cases that become moot due to a voluntary settlement between the parties. Federal court jurisdiction is limited to deciding live cases and controversies between litigants. When an

appeal becomes moot, the appellate court therefore must dismiss the appeal. Whether the court also may vacate the judgments below depends upon whether a party seeking vacatur has standing to obtain such a result. While a former litigant who is prevented from appealing an adverse judgment due to happenstance may have a cognizable interest in obtaining vacatur of that judgment, a litigant such as U.S. Bancorp that seeks to vacate an entered judgment simply because it does not like the precedential effect of the judgment does not.

An important collateral effect of any judgment or published opinion is the further interpretation and clarification of the law through the creation of precedent. In a system based upon the principle of stare decisis, each judicial precedent is of significance to future litigants, the courts, the legislature, and the public at large. A rule that would mandate, or even permit, vacatur of lower court decisions merely because the parties settle their dispute after a judgment is entered and an opinion issued would deprive society of the benefits of these decisions, decisions reached through the expenditure of time, energy, and resources by the judicial system.

Allowing litigants to use settlement on appeal to nullify precedent would facilitate the manipulation of legal precedent and would result in a skewed body of case law favoring frequent litigants with the incentive and financial resources to demand vacatur of "unfavorable" lower court decisions. A frequent litigant could use settlement on appeal to expunge decisions from the Federal Reporter in the hope of eventually obtaining a precedent consistent with its interests. Over time, decisions contrary to the interests of such litigants would be

vacated, while decisions favoring those litigants' interests would tend to remain as precedent. In this case, for example, U.S. Bancorp, a major financial institution operating within the Ninth Circuit, seeks to expunge from the Federal Reporter a precedent potentially adverse to its creditor interests in other chapter 11 cases in that circuit. Similarly, the Solicitor General as amicus curiae desires the Court to establish a general rule that would allow the federal government to use settlement as a means to eliminate the precedential value of decisions adverse to the government's interests.

Legal precedent is not the property of any litigant; it belongs to all who are or someday may be participants in, or protected by, our judicial system. Although individual litigants properly may attempt to obtain favorable precedent within the context of a live case or controversy, no litigant should be permitted to manipulate the judicial process to erase precedent from the books once the dispute has become moot due to circumstances within the litigant's own control. Where no live case or controversy remains, U.S. Bancorp has no right to manipulate judicial precedent to serve its interests in future litigation.

No empirical evidence suggests that the rule U.S. Bancorp seeks would have the net effect of encouraging settlements. To the contrary, common sense indicates that there would be little or no change in the total number of settlements at the trial and appellate levels. While allowing parties to erase unfavorable precedent by settling on appeal might encourage some settlements on appeal, it also would discourage settlement at the trial level by reducing the risk to litigants that unfavorable precedent might result from an adverse judgment that could not be

vacated on appeal. Assuming that U.S. Bancorp's construct would have no net effect on the *total* number of settlements, it would nonetheless be detrimental to the judicial system because it would encourage settlements later in the litigation process, after pretrial and trial expenses have been incurred. Given the overwhelming burden on our federal district courts and bankruptcy courts caused by increasing case loads, and given the substantial judicial resources that must be devoted to trial and pretrial matters, the Court should not adopt a rule that would serve to delay the timing of settlements until after trial.

U.S. Bancorp contends that the potential application of nonmutual collateral estoppel by unrelated third parties in future litigation justifies vacating the decisions below. However, as noted, the decisions below involved only a pure issue of law, and there are no factual findings in this case that could be used against U.S. Bancorp in future litigation. In any event, the policies supporting collateral estoppel outweigh any settling party's interest in obtaining a vacatur of a lower court judgment. Collateral estoppel promotes certainty in the law and conserves judicial resources by precluding multiple litigation of the same issues of law or fact unsuccessfully argued by a party in prior litigation. In light of the importance of collateral estoppel to the efficient administration of justice, the Court in recent years has consistently acted to broaden the application of collateral estoppel in cases involving private litigants. The extension of the Court's vacatur practice sought by U.S. Bancorp would undermine the benefits of collateral estoppel by allowing parties to nullify any collateral effects of an adverse

judgment after that judgment is entered. While the avoidance of appellate litigation through settlement on appeal is not without value, that value would be offset if, as a result of vacatur, future litigation with third parties regarding identical issues would not be precluded.

Finally, even if vacatur might be appropriate in limited circumstances where a case is settled contingent upon vacatur while on appeal, the facts of this case clearly warrant preservation of the decisions below. The settlement reached between U.S. Bancorp and Bonner Mall was not contingent upon vacatur of the lower court decisions and, in fact, already has been consummated. U.S. Bancorp's decision to seek vacatur of the lower court decisions is a *post-hoc* unilateral action that will have no bearing whatsoever on the effectiveness of the settlement. Moreover, given that the decisions below involve a pure legal issue, U.S. Bancorp cannot claim any prejudice with respect to adverse factual findings, as no such findings exist. Nor does U.S. Bancorp seek vacatur to affect its rights vis-a-vis Bonner Mall partnership, as U.S. Bancorp admits that the new value principle would be of little or no relevance to any future dispute between it and Bonner Mall. Rather, U.S. Bancorp seeks to nullify a precedent adverse to its creditor interests in other chapter 11 cases in the Ninth Circuit. This reason alone does not justify negating the efforts expended by the judicial system in creating precedent that will guide the courts and parties in the Ninth Circuit until such time as the Court has occasion to decide the underlying merits of the new value principle.

The Ninth Circuit has published an opinion resolving in that Circuit an issue that previously consumed substantial judicial resources both in this and many other

chapter 11 cases. This Court may or may not grant certiorari at a later date in order to address, as a national matter, the legal principle at issue. For now, however, litigants and the public at large in our nation's largest circuit may order their affairs in reliance upon the Ninth Circuit's resolution of this matter. U.S. Bancorp, a former litigant which lost twice on appeal, should not be permitted unilaterally to compel vacatur and thereby engender litigation anew over a matter which, at least in the Ninth Circuit, has been put to rest.

ARGUMENT

I. The "Well Established" Practice Of Vacating Lower Court Decisions That Become Moot While On Appeal Does Not Extend To Those Cases That Become Moot Due To A Voluntary Settlement Between The Parties.

A. The Court's Precedents Limit The Practice Of Vacating Lower Court Decisions To Those Instances In Which A Case Becomes Moot Due To "Happenstance."

The Court's decision in *United States v. Munsingwear* is "perhaps the leading case on the proper disposition of cases that become moot on appeal." *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 n.* (1979). *Munsingwear* was the first time the Court explored the rationale underlying its "established practice" of vacating lower court decisions that become moot while pending on appeal or certiorari. 340 U.S. at 39. As stated by the Court, the purpose of this practice is to protect litigants from the adverse

preclusive effects of a judgment made unreviewable through circumstances beyond that litigant's control. Vacating a lower court decision that becomes moot while on appeal "clears the path for future relitigation of the issues *between the parties* and eliminates a judgment, *review of which was prevented through happenstance.*" *Id.* at 40 (emphasis added).

The facts of *Munsingwear* illustrate a classic example of the circumstances under which a lower court decision should be vacated due to "happenstance." The United States had filed a two-count complaint against Munsingwear seeking injunctive relief and treble damages based upon alleged violations of a maximum price control regulation. By stipulation the parties agreed to resolve the government's request for an injunction first, holding the suit for damages in abeyance. The district court subsequently held that Munsingwear's prices complied with the regulations and dismissed the government's request for injunctive relief. While on appeal, the commodity in question was decontrolled and, on the government's motion, the court of appeals dismissed the appeal as moot. The government did not ask, however, that the lower court opinion be vacated. The district court subsequently dismissed the government's action for damages, holding that its decision with respect to the requested injunctive relief was res judicata, and the court of appeals affirmed.

In affirming the lower courts' dismissal of the government's complaint, the Court held that the government should have sought vacatur of the district court opinion at the time the dispute regarding the injunction had become moot. Because the dispute became moot due to

"happenstance", rather than based upon the voluntary actions of one or both of the parties, the Court concluded that vacatur would have been available to avoid prejudice to the government from the preclusive effects of an unreviewable decision. *Id.* at 40-41.

Although the Court has cited *Munsingwear* numerous times in considering whether to vacate lower court decisions regarding disputes that become moot while pending before the Court, it has done so only once in anything more than summary fashion during the nearly four-and-one-half decades since *Munsingwear* was decided. In *Karcher v. May*, 484 U.S. 72 (1987), the Court considered the limits of the "happenstance" requirement of *Munsingwear*, holding that mootness resulting from a voluntary decision not to pursue an appeal did not justify vacatur of a lower court judgment. The Court distinguished between an appeal that became moot due to the deliberate act of one of the parties, such as a settlement or voluntary dismissal of an appeal, and one whose mootness is "unattributable to any of the parties." *Id.* at 83. The Court indicated that only the latter situation is subject to the *Munsingwear* holding.

In *Karcher*, two members of the New Jersey state legislature had obtained permission to represent that body in connection with a challenge to a state law authorizing contemplative "periods of silence" in public schools. The district court and Court of Appeals for the Third Circuit found the law unconstitutional, and the members filed a notice of appeal with the Court. Subsequently, the Court was informed that the legislature was withdrawing the appeal the members had brought on its behalf. The Court dismissed the appeal, but denied the

members' request that the Court vacate the lower court decisions under *Munsingwear*. In concluding that *Munsingwear* did not apply, the Court reiterated that *Munsingwear* applies to those cases made unreviewable due to "happenstance." According to the Court:

> This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party – the New Jersey Legislature – declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case.

Id. at 83.[4]

It is true that the Court on occasion has vacated a lower court decision based upon a settlement consummated while a case was pending before the Court. *See, e.g., City Gas Co. v. Consolidated Gas Co.*, 499 U.S. 915 (1991); *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985); *J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S.

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[4] Most recently, Justice Stevens, joined by retiring Justice Blackmun, reiterated that *Munsingwear* is limited to only those cases in which mootness is the result of "happenstance." In *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 114 S. Ct. 425 (1993) (per curiam), the Court granted certiorari to consider the identical question of vacatur practice at issue in this case. Although the majority of the Court in *Izumi* did not reach the *Munsingwear* issue, Justice Stevens made clear that its holding "does not apply to mootness achieved by purchase." *Id.* at 431. According to Justice Stevens:

> Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur.

Id.

115 (1959). *But see Minnesota Newspaper Ass'n, Inc. v. Postmaster General*, 488 U.S. 998 (1989) (dismissing appeal by stipulation pursuant to Supreme Court Rule 53 without vacating lower courts' decisions); *St. Lukes Fed'n v. Presbyterian/St. Lukes Medical Center*, 459 U.S. 1025 (1982) (dismissing petition for writ of certiorari without vacatur). In no case, however, has the Court held that vacatur in light of settlement on appeal is mandatory. Rather, the Court has vacated lower court decisions usually at the request or with the consent of all parties, and always in summary fashion without setting forth its analysis. As the Court repeatedly has acknowledged, its summary decisions are of limited precedential value; they do not foreclose the Court from considering more fully questions previously disposed of summarily. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 309 n.1 (1976); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).[5] Other than in *Karcher*, in which the Court reaffirmed *Munsingwear's* "happenstance" requirement, the Court never has expressly revisited the policy considerations underlying *Munsingwear* and the limitations of the doctrine it espoused. Thus, the Court should reject U.S. Bancorp's reading of these summary decisions as mandating an extension of *Munsingwear* to cases involving voluntary settlements and

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[5] As stated by Chief Justice Rehnquist with respect to the Court's summary disposition of cases that come before the Court pursuant to its appellate jurisdiction, "[n]o one seriously contends that these summary [decisions] receive the full consideration that is given to a case argued on the merits and disposed of by written opinion." Rehnquist, C.J., *Whither the Courts*, 60 A.B.A.J. 787, 790 (1974), *quoted in* Stern, et al., *Supreme Court Practice* 246 (6th ed. 1986).

instead should reaffirm that *Munsingwear* is limited to cases of happenstance as the Court did after full consideration of the issue in *Karcher*.[6]

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[6] U.S. Bancorp's reliance on the Court's decision in *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936), also is misplaced. In *Duke Power*, the Court addressed the question whether a lower court's opinion should be vacated, not in the context of a dispute that had become entirely moot, but rather in the context of a live dispute, the nature of which had been affected by circumstances extrinsic to the litigation after completion of trial. Specifically, various utility companies challenged the authority of Greenwood County to enter into an agreement with the federal government relating to the construction and operation of a power plant. The district court ruled that certain terms of the agreement did exceed the county's authority. While the case was pending on appeal, however, the federal government and the county entered into a new agreement. Although the new agreement did not include the terms the district court found to be improper, the utility companies still found it objectionable.

The court of appeals ordered that the district court reconsider its decision in light of the new contract, but it did not vacate the district court's first decision. On certiorari to this Court, the Court ordered that the district court's decision should have been vacated. The Court held:

> [if] supervening facts require a retrial in light of a changed situation, the appropriate action of the appellate court is to vacate the decree which has been entered and revest the court below with jurisdiction of the cause to the end that issues may be properly framed and the retrial had.

Id. at 267-68.

Thus, in contrast to the facts in *Munsingwear*, the changed circumstances in *Duke Power* did not render the dispute moot; the dispute remained very much alive, but the lower courts had to start their analysis anew based upon changed circumstances. In any event, the changed circumstances requiring a new trial were not the result of any settlement, but of an event extrinsic to

B. A Majority Of The Federal Courts Of Appeal Have Declined To Extend The Practice Of Vacatur To Voluntary Settlements As U.S. Bancorp Requests.

As interpreted by a majority of the courts of appeal to consider the issue, "[n]one of the Supreme Court cases indicates that the appellate court has a duty to vacate the district court judgment when the parties have agreed on a settlement of the claims between them, that is, where mootness is neither happenstance, nor attributable to one party but not the other." *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 383-84 (2d Cir. 1993) (citations omitted). The Third, Sixth, Seventh, Tenth, and District of Columbia Circuits agree that a trial or intermediate court decision need not be vacated because a settlement has rendered the dispute moot on appeal. *See Clarendon Ltd. v. Nu-West Indus.*, 936 F.2d 127 (3d Cir. 1991); *Constangy, Brooks & Smith v. N.L.R.B.*, 851 F.2d 839, 842 (6th Cir. 1988); *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988); *Oklahoma Radio Associates v. F.D.I.C.*, 3 F.3d 1436, 1439 (10th Cir. 1993); *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991).[7] The Second Circuit also

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the litigation. Although the Court did not articulate its decision in *Duke Power* in terms of "happenstance," the happenstance requirement clearly was satisfied based on the facts of that case.

[7] *See also Law Offices of Seymour M. Chase, P.C. v. Federal Communications Comm.*, 843 F.2d 517, 522 n.9 (D.C. Cir. 1988) (Ginsburg, J.) (noting that in *Karcher* the Supreme Court recognized that *Munsingwear* applies when a case becomes moot due to "happenstance," not when a party voluntarily declines to pursue its appeal).

has declined to vacate appellate court decisions rendered moot by settlement, *see Arthur v. Manch*, 12 F.3d 377, 381 (2d Cir. 1993); *Manufacturers Hanover, supra*, although the Second Circuit has vacated trial court opinions rendered moot on appeal, *see Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985).[8]

Three other Circuits have declined to extend *Munsingwear* to voluntary settlements in all cases, preferring instead to adopt a case-by-case approach. In deciding whether to vacate lower court decisions, the Ninth Circuit in particular considers the hardship to the parties of leaving such decisions in place, but places greater importance on the often public policy of preserving judicial opinions as precedent. *See National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982). The Fourth and Eleventh Circuits also appear to have adopted case-by-case approaches, *see Westmoreland v. National Transp. Safety Bd.*, 833 F.2d 1461,

[8] In *Nestle*, the Second Circuit held that a district court should vacate its judgment if the parties reached a settlement agreement conditioned on such a vacatur while the matter was pending on appeal. In *Manufacturers Hanover*, however, the Second Circuit expressly refused to extend its holding in *Nestle* to those instances in which parties sought to vacate an appellate court opinion. The Second Circuit distinguished *Nestle* based on the precedential importance of appellate decisions published in the Federal Reporter. *See* 11 F.3d at 384-85. The Second Circuit also relied upon the facts that, in the case of vacating an appellate decision, the parties already had the opportunity for one appellate review and that no further review of right would be available. *Id.* at 384.

1463 (11th Cir. 1987) ("the court should look to the policies behind *Munsingwear* . . . to see if they are implicated"); *Clipper v. Takoma Park*, 898 F.2d 18 (4th Cir. 1989) (en banc) (rejecting without discussion dissent's view that *Munsingwear* required vacatur of decision rendered moot by settlement; *see id.* at 19 (Widener, J., dissenting)), although from time to time they have granted summarily joint requests to vacate lower court decisions mooted by settlement, *see Baxter Healthcare Corp. v. Healthdyne, Inc.*, 956 F.2d 226 (11th Cir. 1992); *Kennedy v. Block*, 784 F.2d 1220, 1225 (4th Cir. 1986).[9]

Only the Federal Circuit has in anything more than a summary opinion concluded that all lower court decisions must be vacated if they were rendered moot by settlement, *see Federal Data Corp. v. SMS Data Products Group, Inc.*, 819 F.2d 277 (Fed. Cir. 1987), although the Fifth and Eighth

[9] In its circuit-by-circuit review of appellate court decisions addressing the question before this Court, the Solicitor General relegates to "*But cf.*" citations the most recent, as well as the most in-depth, analyses of the question by the Second and Tenth Circuits. *See* S.G. Brief 7 n.5 (treating *Manufacturers Hanover* and *Oklahoma Radio Associates* as somehow contrary to the "general rule" of those circuits). With respect to the Tenth Circuit, the summary decision cited by the Solicitor General as representing the general rule, *Studio 1712, Inc. v. Etna Prods. Co.*, 968 F.2d 10 (10th Cir. 1992), is not even relevant. In *Studio 1712*, the Tenth Circuit merely ordered the District Court to vacate orders granting and modifying a preliminary injunction upon settlement of a dispute, not a surprising result in light of the fact there was no longer any reason to enjoin any party's actions. The Solicitor General also ignores the impact of the Fourth and Eleventh Circuit's decisions in *Clipper v. Takoma Park* and *Westmoreland*, respectively, both of which cast doubt over the Solicitor General's cursory conclusions regarding those circuit's views.

Circuits without analysis have vacated lower court decisions following settlement at the parties' joint request. *See Ruiz v. Estelle*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983); *Hendrickson v. Secretary of Health & Human Services*, 774 F.2d 1355 (8th Cir. 1985). These courts apparently believe that *Munsingwear* compels this result, a view that this Court's own precedents belie and a view that a majority of the appellate courts to have considered the issue have rejected. The Court should use this case to confirm the majority practice by declining U.S. Bancorp's request to vacate the decisions below.

II. Article III Precludes Vacating A Judgment In A Case Rendered Moot Through Settlement When No Party Has A Cognizable Interest In Obtaining Such Relief.

Fundamental to our federal judicial system is the requirement that federal court jurisdiction be limited to deciding live "cases or controversies." *See* U.S. Const., Art. III, § 2. The dismissal of cases rendered moot while on appeal is thus constitutionally mandated. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987) ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case.").[10] However, the constitutional basis for the Court's practice of vacatur following dismissal as set forth in *Munsingwear* is

[10] *See also* Wright, et al., 13A *Federal Practice & Procedure* § 3533.1, at 229 (2d ed. 1984 & Supp. 1994). *But see Robinson v. California*, 371 U.S. 905 (1962) (declining to vacate reversal of appellant's conviction even though appellant had died while case was pending before the Court).

far less clear. *See National Union Fire Ins.*, 891 F.2d at 766 (holding that *Munsingwear* is neither statutorily nor constitutionally required).

It is clear that Article III does not *require* that a lower court judgment be vacated, so long as there existed a live case or controversy *at the time the judgment was rendered*, *see Hewitt v. Helms*, 482 U.S. 755, 761 (1987), even if the dispute subsequently becomes moot on appeal. Rather, the reasons for vacatur in cases such as *Munsingwear* are equitable concerns for litigants who are denied, due to no fault of their own, an opportunity to challenge an adverse decision rendered by a lower court. *See* 340 U.S. at 40. The Court has never explored whether Article III may, at least in some cases, *prohibit* an act of vacatur when no live dispute exists due to a settlement that has rendered a case moot.

Article III does not permit a federal court to issue an order, including a vacatur order, that does not affect a tangible interest, such as money, reputation, or liberty; that limitation is the heart of the "case or controversy" requirement of Article III. *See O'Shea v. Littleton*, 414 U.S. 488, 493-95 (1974). In *Munsingwear*, the Court recognized that when a party is denied the right to appeal an adverse judgment due to circumstances beyond its control, that party may have standing to seek vacatur of the judgment because the party has a cognizable interest in avoiding the res judicata effects of that judgment. In this case, by contrast, U.S. Bancorp can demonstrate no cognizable interest in obtaining vacatur of the Ninth Circuit's opinion. U.S. Bancorp voluntarily settled its appeal, admits that "[t]he decisions below in this case addressed [a]

purely legal question," Petr. Brief 41, and severely discounts the possibility of future litigation with Bonner Mall on the "new value" issue, *id.* at 39. By its own admission, U.S. Bancorp simply desires to have the Ninth Circuit's published opinion vacated because of its precedential effect in future litigation. *Id.*[11] However, a party has no standing to seek vacatur of a decision merely for the reason that it dislikes the precedent the decision creates. *See In re Smith*, 964 F.2d 636, 638 (7th Cir. 1992); *Alliance to End Repression v. Chicago*, 820 F.2d 873, 875-78 (7th Cir. 1987); *Radiofone, Inc. v. FCC*, 759 F.2d 936, 940-41 (D.C. Cir. 1985) (opinion of Scalia, J.); *see also* section III.B.1, *infra*, (discussing societal, as opposed to private, value of precedent). Otherwise, as Judge Posner noted in *Smith*, a person could have standing to "appeal a judgment in a suit to which he wasn't a party, on the ground that the judgment might operate as a precedent in his own suit, or could intervene in a suit on the same ground." 964 F.2d at 638. In either case, while the party may be "interested" in nullifying the precedent, *the party has no cognizable Article III interest in such a result*. When

[11] U.S. Bancorp does not (and cannot) claim that it is concerned about the potential nonmutual collateral estoppel effects of the decisions below in future litigation with third parties. Because the decisions involved a purely legal issue, there were no factual findings adverse to U.S. Bancorp's interests. As discussed in section III.D.1, *infra*, nonmutual collateral estoppel generally is limited to questions of fact or, sometimes, mixed questions of fact and law; it does not extend to pure questions of law. *See Montana v. United States*, 440 U.S. 147, 162 (1979) (collateral estoppel does not apply to "issues of law [that] arise in successive actions involving unrelated subject matter"); *United States v. Moser*, 266 U.S. 236, 242 (1924).

the only stake a former litigant retains in a case is its desire to eliminate what it regards as a potentially troublesome precedent, as is the case here, there is no constitutional basis for this or any other federal court to take any action, including an act of vacatur. *See Clark Equipment Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992); *In re Smith*, 964 F.2d at 638.[12]

III. The Policies Underlying *Munsingwear* And The Importance Of Precedent In Our Federal Court System Dictate Against Extending Vacatur Practice To Cases That Settle While Pending On Appeal.

A. The Vacatur Practice Recognized In *Munsingwear* Was Intended To Protect Parties From Suffering Adverse Preclusive Effects Of A Decision Rendered Unreviewable Through Circumstances Beyond Their Control, Concerns That Do Not Apply When A Case Becomes Moot On Appeal Due To A Voluntary Settlement.

The mere fact that a case becomes moot, while pending on appeal or otherwise, does not entitle a litigant to obtain vacatur of a previously entered judgment. *See Karcher*, 484 U.S. at 83; *Manufacturers Hanover*, 11 F.3d at 383. Rather, as announced by the Court in *Munsingwear* and *Karcher*, the test is whether vacatur is necessary to

[12] Consistent with these constitutional concerns, courts generally do not vacate decisions in cases that have become moot *after* the resolution of all appeals. *See Armster v. United States Dist. Court*, 806 F.2d 1347, 1355 (9th Cir. 1986).

prevent undue prejudice to the litigant through the preclusive effect of an adverse judgment that has been rendered unappealable due to circumstances beyond the litigant's control. By mandating vacatur when a party's right to appeal is foreclosed through "happenstance," "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." 340 U.S. at 40.

There is a significant "distinction between litigants who are and are not responsible for rendering their case moot at the appellate level." *Ringsby Truck Lines*, 686 F.2d at 721. Where the losing party chooses to settle rather than to pursue its appeal, review is not prevented by "happenstance." *See Karcher*, 484 U.S. at 83; *see also Oklahoma Radio Associates*, 3 F.3d at 1439; *In re United States*, 927 F.2d at 628. Rather, mootness is the direct and foreseeable result of voluntary actions by the parties. Although the onset of mootness prevents a reviewing court from taking further action on the merits of a case, the parties to the settlement may take steps to preserve their relative rights independent of any further judicial intervention. Most notably, a well-drafted settlement agreement can resolve what effect, if any, a previously entered judgment will have on the parties' relative rights, both with respect to the current litigation and to any subsequent dispute. The parties voluntarily may choose to be bound by all or part of the judgment, or the parties may agree to treat the entire judgment as a nullity *vis-a-vis each other. See Memorial Hospital*, 862 F.2d at 1302 (litigants may settle "just as they may reach any other (lawful) contract"). Other than entering an order dismissing the litigation as

moot, no further judicial action generally is necessary to effectuate the terms of such a settlement agreement.[13]

U.S. Bancorp also raises an issue the Court did not address in *Munsingwear*, namely the litigants' rights vis-a-vis unrelated third parties in subsequent litigation. However, as the sections below demonstrate, both policy and equity weigh heavily against vacatur of lower courts' decisions in cases rendered unreviewable by the litigants' own voluntary actions. The societal value of judicial precedents and their role in stare decisis and collateral estoppel outweigh the desire of individual litigants to sweep them aside as part of a settlement.

B. Extending *Munsingwear* To Cases That Settle Voluntarily While Pending On Appeal Would Undermine The Precedential Value Of Federal Court Decisions, Waste Judicial Resources, And Lead To Manipulation Of Precedent.

1. Through The Resolution Of Cases And Controversies, Federal Courts Create Precedent That Is Of Critical Importance To Resolving Future Disputes.

In *Munsingwear*, the Court made clear its concerns about the *preclusive* effect an adverse judgment may have

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[13] The terms of certain settlements may be subject to judicial scrutiny, such as settlements of claims by and against bankruptcy estates, *see* Fed. R. Bankr. P. 9019, or settlements that may affect third parties' rights. *See Evans v. Jeff D.*, 475 U.S. 717, 727 & n.13 (1986) (discussing the courts' authority to approve class action settlements). Judicial inquiry of this nature generally is aimed at determining whether the terms of a settlement are fair and reasonable. There is no reason why the parties' mutual agreement to alter the effect of a judgment vis-a-vis the parties would affect judicial scrutiny of that settlement.

on a litigant denied the right to pursue an appeal due to "happenstance" rendering the case moot on appeal. The Court, however, never has expressed any concerns regarding the *precedential* effect of a decision rendered moot on appeal. Just as a litigant does not have a right to demand that an opinion be published (or depublished), *see Memorial Hospital*, 862 F.2d at 1302, a litigant has no right to seek vacatur of a decision on the ground that it dislikes the precedent created by that decision. *See Radiofone, Inc. v. FCC*, 759 F.2d at 940-41; *see also* section II, *supra* (discussing U.S. Bancorp's lack of standing to seek vacatur). While "[t]he parties may be free to contract about the preclusive *effects* of these decisions inter se . . . ; they are not free to contract about the existence of these decisions." *Memorial Hospital*, 862 F.2d at 1303 (emphasis in original).

When a federal court enters a judgment, it does more than merely resolve the particular case or controversy before it; the court's conclusions "are recorded and thus preserved for the future." *Id.* The consistent development of legal principles through this method "fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986)); *see also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. at 431 (Stevens, J., dissenting from dismissal of certiorari as improvidently granted) ("Judicial precedents are presumptively correct and valuable to the legal community as a whole"). This is particularly apparent at the appellate court level, where significant decisions addressing novel and disputed issues of law routinely are published in the

Federal Reporter and, thus, are made readily available for review by litigants, attorneys, scholars, government officials, courts, the press, and the public at large. *See Manufacturers Hanover*, 11 F.3d at 385.[14]

The evenhanded development of precedent is essential to the fair application of stare decisis. "Time and time again, this Court has recognized that 'the doctrine of stare decisis is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm.*, 112 S. Ct. 560, 563 (1991) (quoting *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). Through the principle of stare decisis, a court's decision is to be regarded with more than idle curiosity; the decision has a persuasive and, with respect to litigation within the same jurisdiction, binding effect on the outcome of subsequent litigation.[15] For this reason, courts that have declined to allow litigants to erase the precedential effects of lower court decisions through settlement consistently have relied upon the importance of precedent in our judicial system. As Judge Easterbrook wrote for the Seventh Circuit with respect to bankruptcy and district court

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[14] U.S. Bancorp attempts to argue that decisions in potentially "certworthy" cases somehow have less precedential value than decisions in other cases. *See* Petr. Brief 32-33. There exists no authority for this proposition, and a judgment subject to this Court's review remains effective unless and until this Court orders otherwise.

[15] That a controversy becomes moot subsequent to the rendering of a judgment does not cast doubt over the validity of that judgment or of its precedential value, so long as at the time the judgment was rendered, it involved the resolution of a live case or controversy. *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987); *see also* section II, *supra*.

opinions the parties sought to vacate, "The opinions written in this case record two judges' solutions to a legal problem. These opinions may be valuable for other litigants and judges; they may also be useful to [the losing party] itself at another time." *In re Memorial Hospital*, 862 F.2d at 1303. U.S. Bancorp's effort to vacate the Ninth Circuit's reported opinion below thus conflicts with a fundamental principle of our judicial system – the even-handed application of stare decisis.

2. Vacatur Of Judgments In Cases That Settle On Appeal Would Waste Judicial Resources By Requiring Needless Relitigation Of Unsettled Legal Questions.

Whether at the trial or appellate level, the process of deciding a particular case or controversy typically involves a tremendous investment of time and money by the judicial system. Judges, their staffs, and the administrative offices of the courts play an integral role in the pretrial, trial, and appellate stages of a dispute. The benefits of this effort to future litigants would be lost, however, if parties were permitted to obtain vacatur of judgments upon demand and to cause published opinions effectively to be erased from the Federal Reporter.

In *In re Memorial Hospital*, the Seventh Circuit in an appeal in a bankruptcy case specifically highlighted the effort expended by both the bankruptcy and district court judges, effort similar to that expended by the Bankruptcy Court, District Court, and Ninth Circuit in this case. In light of this significant investment of judicial resources, the court declined to vacate the lower court decisions

merely because the parties had requested vacatur as part of a settlement:

> Just as it is inappropriate to approve a consent decree that calls for a profligate commitment of the court's resources, so it may be inappropriate to approve a settlement that squanders judicial time that has already been invested. The bankruptcy and district judges devoted many hours to this case and resolved it on the merits. Their decisions have persuasive force as precedent that may save other judges and litigants time in future cases. Some of this force would remain as long as the court's opinion were available to read; it does not vanish on vacatur, although such an order clouds and diminishes the significance of the holding. . . . True, litigation is conducted to resolve the parties' controversies; precedent is a byproduct of resolving disputes, rather than the *raison d'etre* of the judicial system. When a clash between genuine adversaries produces a precedent, . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.

862 F.2d at 1302 (citations omitted); *see also Manufacturers Hanover*, 11 F.3d at 385; *Oklahoma Radio Associates*, 3 F.3d at 1444.[16]

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[16] The Solicitor General argues, and most courts generally agree, that a decision vacated on mootness grounds loses its precedential value, although it may continue to be persuasive. *See* S.G. Brief 19 n.18 and cases cited therein. *But see Harris v. Board of Governors*, 938 F.2d 720, 723 (7th Cir. 1991) ("[T]he only

U.S. Bancorp contends that, by vacating decisions in cases mooted by settlement while pending on appeal, the Court "can facilitate the ultimate resolution of the [question of law at] issue by encouraging its continued examination and debate." Petr. Brief 33. The example U.S. Bancorp cites in support of this argument, however, *demonstrates why the Court should refrain from vacating circuit court opinions unless absolutely necessary*. As related by U.S. Bancorp, at least four separate panels of the Court of Appeals for the Seventh Circuit have considered in published opinions the new value principle during the last eight years. *See* Petr. Brief 33-34.[17] In each one of these

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effect of the vacatur [due to mootness] is to deprive those orders of any preclusive effect in subsequent litigation. It does not deprive them of such stare decisis effect as they may have . . . ."); *but cf. Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir.) (decision vacated by Court for reconsideration in light of new precedent may continue to have precedential weight), *cert. denied*, 112 S. Ct. 371 (1991). Although Bonner Mall would welcome a contrary rule – that the Ninth Circuit's decision would retain its precedential effect even if it were vacated as moot – Bonner Mall recognizes that this Court may not be inclined to adopt such a rule in this case. For this reason, the precedential value of the Ninth Circuit's decision can be preserved with certainty only if U.S. Bancorp's request for vacatur is rejected.

[17] *See Official Creditors' Comm. ex rel. Class 8 Unsecured Creditors v. Potter Material Serv., Inc. (In re Potter Material Serv., Inc.)*, 781 F.2d 99 (7th Cir. 1986); *In re Stegall*, 865 F.2d 140 (7th Cir. 1989); *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whitting*, 908 F.2d 1351 (7th Cir. 1990); *Snyder v. Farm Credit Bank of St. Louis (In re Snyder)*, 967 F.2d 1126 (7th Cir. 1992). As noted in the Statement of the Case, *supra*, the new value principle authorizes existing equity holders in a chapter 11 debtor to contribute new value in the form of cash or other consideration pursuant to a

decisions, the Seventh Circuit declined to resolve the question whether the new value principle survived enactment of the Bankruptcy Code, reserving judgment for a later day. U.S. Bancorp contends that, by declining to resolve the new value principle each time it was presented, the Seventh Circuit paved the way for yet another "valuable opinion" that contributed to the legal debate on the new value principle, but which of course resolved nothing. Similarly, U.S. Bancorp contends that by vacating the Ninth Circuit's opinion in this case, the Court could allow the judges and litigants in that circuit to continue to debate the new value principle pending final resolution by the Court.

U.S. Bancorp appears to misunderstand both the role of the Court in resolving disputed issues of law and of the courts in general in facilitating the fair and efficient administration of our judicial system and creating certainty in the law. Among the Court's principal criteria for determining whether to grant certiorari on a particular issue of federal law is whether there exists conflict *among various circuits* regarding that issue. *See* Supreme Court Rule 10.1(a).[18] The Court generally does not involve itself in disputes among panels of a particular circuit, or in

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plan of reorganization in order to retain or receive equity interests in the debtor, notwithstanding whether creditors are paid in full. The Court originally granted certiorari in this case to determine whether the new value principle survived enactment of the Bankruptcy Code.

[18] *See also McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits"); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits").

conflicts between various districts within a single circuit. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Nor does the Court typically look directly to the district courts for guidance on a particular legal issue, preferring instead to have issues sharpened by a number of intermediate appellate courts before granting review. For this reason, vacating an appellate court decision simply because it became moot while on appeal would provide little, if any, benefits to the Court in its ultimate resolution of a substantive question of law.

Nor would a practice of routinely vacating circuit court decisions in disputes rendered moot on appeal by settlement benefit litigants within each particular circuit. Even when the Supreme Court may eventually reach a contrary conclusion, the resolution of the particular issue within a circuit has substantial value to litigants and judges. Certainty in the law, even "imperfect" law, creates predictability, avoids litigation, and enables parties to conform their conduct to legal norms. *See Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (" 'in most matters it is more important that the applicable rule of law be settled than it be settled right' ") (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). While the "give and take" of conflicting judgments may make interesting legal study, *see* Petr. Brief 34, the marginal benefits of differing opinions as to a particular question of law diminish rapidly. The legal system was intended to resolve real problems among real people in, presumably, the most just, cost effective, and timely manner possible. During the eight years in which the Seventh Circuit has exercised what U.S. Bancorp calls "prudent self-restraint," debtors, creditors, bankruptcy judges, and

other parties affected by the bankruptcy process have been required to prepare to litigate in the context of each and every new value plan presented in that circuit the essential question whether the new value principle even exists. This litigation, and the costs and delays associated therewith, could have been avoided if the bankruptcy courts had been guided by binding Seventh Circuit precedent. Moreover, the time and energy of four separate panels of the Seventh Circuit have been devoted to researching, presiding over oral argument, and drafting opinions regarding an issue that could have been resolved in that circuit almost a decade ago. It is thus hard to see how leaving an issue open within a particular circuit does much more than create additional litigation, delay, and uncertainty.

3. A Practice Of Vacating Decisions In Cases Rendered Moot On Appeal Will Facilitate The Manipulation of Precedent, Thus Compromising The Integrity Of A Judicial System Based Upon Stare Decisis

The federal judiciary depends on public acceptance of its authority in order to maintain its position in our tripartite system of government. Public acceptance, in turn, requires the preservation of an independent judiciary and the integrity of the decisions it renders. If private parties are permitted to use vacatur to determine which federal court decisions retain their precedential effect and which are rendered nullities, both the independence and the integrity of the judicial system will be called into question. *Cf. Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (private litigants' use of judicial system as

means to advance racial discrimination raises serious doubts as to the integrity of the judicial process).

"A policy permitting litigants to use the settlement process as a means of obtaining the withdrawal of unfavorable precedents is fraught with the potential for abuse." *Oklahoma Radio Associates*, 3 F.3d at 1444. That potential is abundantly apparent in this case, in which both U.S. Bancorp and the Solicitor General openly seek a rule that would enable them to eliminate the precedential value of opinions in the Federal Reporter that they believe to be contrary to their own interests. In other words, U.S. Bancorp and the Solicitor General favor a rule that would allow a party with a deep pocket to eliminate a precedent it dislikes simply by agreeing to a sufficiently lucrative settlement to obtain its adversary's cooperation in a motion to vacate. This effort to manipulate the body of precedent and, thus, to affect the outcome of future cases compromises the integrity of our judicial system and should not be considered a proper use of it. *Manufacturers Hanover*, 11 F.3d at 384; *Clarendon*, 936 F.2d at 129.

In a national economy, it is more likely than not that parties frequently involved in litigation, such as corporations, trade associations, labor unions, and the government, will confront similar factual and legal issues time and time again. It is in this context that the potential for abuse of the vacatur practice is real and apparent. More often than not, government and institutional litigants, be they banks, organized labor, or cigarette manufacturers, are more interested in the precedential effect of a decision than in the details of the particular case. *See* S.G. Brief 20. These particular groups will have a far greater incentive

to develop uniform litigation strategies that include settlement for the purpose of obtaining vacatur than will individual litigants, such as consumers and tort victims. Even if these groups were to lose case after case in the trial courts, they could settle each adverse judgment on appeal, conditioned each time upon vacatur of the lower court opinion. When a favorable decision was finally reached, that would become the surviving precedent. Thus, over time, a policy that allows the use of vacatur to eliminate, and thus manipulate, precedent will result in a skewing of case law in favor of those large institutions with overall litigation strategies, and against individuals who otherwise would be considered fortunate not to be regular participants in the judicial process.[19]

In our system based on stare decisis, courts in essence have the power to "make" law by rendering decisions upon which other courts may be required to rely. Courts do not have free reign to make the law up as they please, however, but rather must decide cases "*as though* they were 'finding' [the law by] discerning what

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[19] Under the rule U.S. Bancorp proposes, there would be no reason why a third party interested in erasing a lower court precedent, but otherwise totally unrelated to the litigation, could not offer to settle the litigation on appeal on behalf of the appellant. For example, in this case if U.S. Bancorp were not particularly concerned with obtaining a vacatur of the Ninth Circuit's opinion, but a banking industry trade group strongly desired such a result, the trade group might contribute the money necessary to effectuate a settlement on appeal for the purpose of nullifying the Ninth Circuit's precedent. This extreme form of third party manipulation of judicial precedents would be the logical result of the vacatur practice U.S. Bancorp seeks to establish.

the law *is*." *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring in the judgment) (emphasis in original). In this case, the Ninth Circuit has "found" the law with respect to the new value principle, a legal discovery that U.S. Bancorp does not like. By requesting vacatur of the Ninth Circuit's published opinion, U.S. Bancorp is asking this Court to take law that the Ninth Circuit has "found" and, through vacatur, to "lose" that law so it may be found another day (presumably looking more like a rule U.S. Bancorp would support). This Court should not indulge U.S. Bancorp in this game of precedential hide and seek.

The Court should not "encourage litigants who are dissatisfied with the decision of the trial court 'to have them wiped from the books'" by allowing vacatur to be a part of settlement on appeal. *United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988) (quoting *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 721 & n.1 (9th Cir. 1982)); *see also In re United States*, 927 F.2d 626 (D.C. Cir. 1991). Denying U.S. Bancorp the vacatur it seeks would "preserve[] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990); *see also Reynolds v. C.I.R.*, 861 F.2d 469, 472 (6th Cir. 1988) (applying doctrine of judicial estoppel "to protect the courts from the perversion of judicial machinery") (internal quotations omitted).

C. Extending *Munsingwear* To Cases That Settle On Appeal Will Not Encourage Settlements In The Aggregate.

1. There Exists No Evidence That Vacatur Of Lower Court Decisions In Controversies Mooted On Appeal Encourages Settlements, And In Fact Such A Practice Would Most Likely Discourage Settlement At The Trial Level.

U.S. Bancorp contends that a rule allowing parties to agree to the vacatur of lower court opinions as part of a settlement on appeal would encourage such settlements. Bonner Mall does not dispute the societal value of encouraging settlement, *see Marek v. Chesny*, 473 U.S. 1, 10 (1985), if that were what an extension of *Munsingwear* would accomplish. Neither U.S. Bancorp nor the Solicitor General, however, has provided any evidence whatsoever showing that authorizing vacatur as a part of settlement on appeal indeed would give parties a greater incentive to settle. In fact, what little empirical evidence does exist reveals that allowing parties to obtain vacatur through settlement on appeal may *discourage* settlement overall, particularly at the trial court level.[20] This is because a rule

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[20] As noted by Justice Stevens in *Izumi*, before the California Supreme Court resolved the issue in *Neary v. Regents of the University of California*, 3 Cal.4th 273 (1992), there existed a split among the California intermediate courts of appeal as to whether parties could obtain vacatur of judgments by settling on appeal. *See Izumi*, 114 S. Ct. at 431 n.11 (Stevens, J., dissenting). While most appellate courts permitted vacatur, one appellate division in California did not. Comparison of the rates of settlement in that court and the rest of the California appellate courts suggests that the denial of vacatur did not discourage

authorizing vacatur would remove one of the incentives to settle a case early – the possible consequences of an adverse judgment in the form of a published opinion that would serve as adverse precedent in future litigation.

In considering whether to settle or to proceed to trial, a litigant must weigh the possibility of losing at trial and the direct and collateral consequences of that loss, against the possibility of vindication. In many cases, however, the consequences of losing extend far beyond the monetary value of the judgment to such matters as the collateral estoppel or precedential effect of the judgment on future litigation. A litigant's desire to avoid these effects provides an incentive to settle a case early, before a court reaches a final judgment. Under the rule U.S. Bancorp supports, however, a party that otherwise would settle before trial in order to avoid the collateral effects of an adverse judgment need not be overly concerned about the prospects of a trial. If a settlement on appeal can result in the vacatur of the trial court's opinion, the litigant generally could proceed with trial assured that it could vacate an adverse judgment for the right price. "This 'free' roll of the dice increases the litigation expenses of both litigants at the costly pretrial and trial level and causes needless consumption of judicial resources." Fisch, *The Destruction of Judicial Decisions by Agreement of the Parties*, 2 N.Y.U. Envtl. L.J. 191, 198

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settlement. In fact, the rate of settlement in the division that did not allow vacatur was twice as high as that in other appellate courts. *See* Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loyola L.A. L. Rev. 1033, 1073 (1993).

(1993). Thus, while U.S. Bancorp's rule might encourage some settlements at the appellate court level, it does so at the price of encouraging further litigation in the district courts. *See Clarendon*, 936 F.2d at 130; *Memorial Hospital*, 862 F.2d at 1302 ("If parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision, an outcome our approach encourages.").[21]

In any event, even if U.S. Bancorp could demonstrate that vacatur may increase the number of settlements at the appellate level, this marginal increase would not override the substantial harms to the operation and integrity of the judicial system created by such a practice. While voluntary settlements should be encouraged, they should not be encouraged by allowing a losing party with a deep pocket to buy vacatur of an adverse precedent. *Clarendon*, 936 F.2d at 129. "[W]hen the proposed savings

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[21] U.S. Bancorp also ignores the numerous other reasons why a party that suffered an adverse decision in the trial court might settle on appeal. First and foremost, the party will surely recognize the distinct possibility of losing a second time on appeal. If the party is concerned about negative precedents, a loss at the appellate level, which might find its way into the Federal Reporter, clearly would be of much greater concern than a loss in the district court. In addition, the party may be unwilling to expend any more costs on litigation and thus regard settlement as the "low cost" alternative. Finally, settlement on appeal often results in a compromising of the effect of the judgment vis-a-vis the parties, thus reducing the party's total monetary exposure or otherwise modifying (as between the parties) the effect of the judgment. That is precisely what occurred in this case, in which certain terms of Bonner Mall's plan of reorganization were compromised in order to reach a consensual agreement with U.S. Bancorp on appeal.

[from settlement] can be realized only at the cost of increasing the vulnerability of the judicial system to manipulation, [the Court should] view the investment as unsound." *Manufacturers Hanover*, 11 F.3d at 385.

2. Even If The Court Were To Find That An Extension Of *Munsingwear* Would Encourage Settlements, Such An Extension Should Be Limited To Those Cases In Which Settlement Is Conditioned Upon Vacatur, Not To This Case Which Was Settled Regardless Of Whether The Ninth Circuit's Opinion Was Vacated.

Even assuming that a policy in favor of encouraging settlement on appeal outweighs the harm that would be caused by allowing parties to stipulate to the vacatur of lower court judgments, that policy is not advanced in a case such as this, in which settlement was not contingent upon vacatur. The settlement between U.S. Bancorp and Bonner Mall already has been effectuated and does not require vacating any opinion of the Ninth Circuit, the District Court, or the Bankruptcy Court. Moreover, given that the Ninth Circuit repeatedly has held that vacatur is discretionary, not automatic as U.S. Bancorp argues, *see National Union Fire Ins., supra; Ringsby Truck Lines, supra*, U.S. Bancorp could not have assumed that the lower courts' decisions would be vacated. Thus, U.S. Bancorp's decision to settle was not premised on vacatur, and the vacatur of the lower courts' decisions will have no prospective effect on the settlement of this case. Regardless of the merits of extending the Court's *Munsingwear* practice to those cases in which settlement is contingent upon

vacatur, the Court should not extend that practice to those situations where a request to vacate a lower court decision is made by only one of the parties after the fact and would not affect the validity of a settlement.

D. Because The Decisions Below Involve A Pure Issue Of Law, Nonmutual Collateral Estoppel Is Not At Issue In This Case; In Any Event, Allowing Parties To Vacate Adverse Judgments Through Settlement Would Undermine The Broad Application Of Nonmutual Collateral Estoppel Against Private Litigants.

U.S. Bancorp argues that unless parties are permitted to vacate adverse lower court decisions in connection with settlement on appeal, such decisions might have a preclusive effect in future litigation due to the application of nonmutual collateral estoppel. U.S. Bancorp's expressed concerns are not at issue in this case, however, as the decisions below involved purely an issue of law – whether a chapter 11 plan of reorganization may rely upon the new value principle – and thus will not give rise to nonmutual collateral estoppel. Moreover, even in cases that might give rise to nonmutual collateral estoppel in future litigation, the policies in favor of nonmutual collateral estoppel, combined with the equitable nature of its application, outweigh any prejudice settling litigants may suffer from an adverse judgment made unreviewable due to a settlement on appeal.

1. Nonmutual Collateral Estoppel Does Not Apply To Pure Questions Of Law.

Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue necessary to its judgment, that decision may be preclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979). Collateral estoppel, like the related doctrine of res judicata, serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (footnote omitted).

Despite the important policy reasons for broad application of collateral estoppel, the doctrine is not without limits. Of particular relevance here is the limitation on the use of nonmutual collateral estoppel generally to issues of fact or mixed questions of fact and law. As the Court stated in *United States v. Moser*, and as U.S. Bancorp acknowledges, *see* Petr. Brief 41, collateral estoppel "does not apply to unmixed questions of law". 266 U.S. 236, 242 (1924); *see also Montana v. United States*, 440 U.S. at 162 ("when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate"). This limitation ensures that a party's purely legal rights are governed by the prevailing precedent within a jurisdiction, particularly when the underlying legal standards may have changed since the prior judgment was entered.

In this case, U.S. Bancorp acknowledges that the Ninth Circuit's decision addressed only a legal issue, and thus will have only precedential (rather than preclusive) effect in future litigation. If in the future U.S. Bancorp must litigate with third parties questions relating to the new value principle, that litigation will be governed by the precedential weight of the Ninth Circuit's decision, not by preclusive nonmutual collateral estoppel. As discussed previously, U.S. Bancorp has no right to seek vacatur based solely upon the precedential effects of the decisions below. *See* sections II, III.B.1, *supra*.

2. Even If Nonmutual Collateral Estoppel Were At Issue Here, The Policies Favoring Its Broad Application Outweigh Any Prejudice Against A Litigant That Voluntarily Settles On Appeal.

Even in cases involving questions of both law and fact, an extension of the vacatur practice to voluntary settlements on appeal would severely undermine the purpose and effectiveness of collateral estoppel. In recent years the Court has acted to expand the scope of collateral estoppel far beyond its common-law origins. In so doing, it has abandoned the requirement of mutuality of parties, *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971), and has conditionally approved the offensive use of collateral estoppel by a nonparty to a prior lawsuit, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).[22] As noted, the broadening of

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[22] Despite the Solicitor General's apparently strong interest in this case, the principles of collateral estoppel do not bind the federal government. *See United States v. Mendoza*, 464 U.S. 154

nonmutual collateral estoppel has been driven by the desire to maximize judicial economy and to ensure consistency among results of litigation. *United States v. Mendoza*, 464 U.S. at 158.

Rather than binding parties to prior judicial findings, the rule U.S. Bancorp seeks would enable parties to engage in a course of action designed to avoid the effect of those findings by settling while a case is pending on appeal. Allowing such settlements to destroy completely the preclusive effect of otherwise valid judgments would frustrate the benefits of collateral estoppel and might lead to inconsistent determinations in subsequent litigation. As one commentator has noted:

> [I]f the appellant is responsible for the intervening change in the status quo that makes appellate review impossible, it is difficult to see why that appellant should be regarded any differently from a party who, having lost in the trial court, has failed to take an appeal within the time allowed by statute. It would be quite destructive to the principle of judicial finality to put such a litigant in a position to destroy the collateral conclusiveness of a judgment by destroying the right to appeal.

(1984). Rather, the Solicitor General desires this Court to extend its *Munsingwear* practice so that the federal government may continue its policy of settling with litigants on appeal in order to avoid the precedential (but not preclusive) effects of adverse decisions. As set forth in section III, *supra*, Bonner Mall believes this manipulation of judicial authority is an improper and unwise use of vacatur. Moreover, as set forth in section II, *supra*, it is questionable whether the Solicitor General even has standing to seek to vacate a judgment solely because it dislikes a particular precedent.

1B *Moore's Federal Practice*, ¶ 0.416[6], at III-343 (2d 1993) (footnotes omitted).

If a party is particularly concerned about the preclusive effect an adverse judgment may have, a very simple solution exists – the party may settle in the trial court *before* a judgment is rendered. Otherwise, having gambled in the trial court (at great expense to the judicial system) and lost, the party may either seek reversal on appeal or accept the collateral consequences of a judgment fully and fairly litigated in the trial court. Although as noted this might tend to discourage some settlements on appeal, this effect would be offset by the benefits of encouraging settlement at the trial level, in addition to eliminating the need for relitigation of issues in subsequent cases.

Finally, in those instances where the application of nonmutual collateral estoppel might create undue hardship, the equitable nature of the doctrine will ensure that a party objecting to the preclusive effect of a prior judgment is not without relief. Trial courts have "broad discretion to determine when [collateral estoppel] should be applied." *Parklane Hosiery*, 439 U.S. at 331. Among the equitable criteria a court may consider is whether "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." Restatement (Second) of Judgments § 28(1). Thus, if on the particular facts of a given case the application of collateral estoppel would not be equitable, the tribunal in a subsequent case can decline to make collateral estoppel available to third parties to be used against a litigant that voluntarily relinquished its right to appeal. In formulating a general rule applicable to all

cases that become moot on appeal, the Court should rely on the ability of trial judges in future litigation to ensure that nonmutual collateral estoppel is not unjustly applied.

IV. If The Court Were To Adopt A "Case By Case" Approach To Vacatur When Parties Settle A Dispute While On Appeal, Vacatur Would Not Be Appropriate In This Case.

In light of the constitutional concerns raised herein and the importance of preserving judgments, preventing the manipulation of precedent, encouraging settlement at the trial level, and preserving the usefulness of collateral estoppel, courts should not vacate judgments on appeal on the basis that the parties have settled the case. At most, vacatur should occur only in those exceptional cases where prejudice that the appellant could not have avoided outweighs the many considerations that militate against the destruction of precedent. No such compelling considerations exist here; U.S. Bancorp simply wants to restore the prior uncertainty as to the law in the Ninth Circuit regarding the "new value principle" until a secured lender can take a "second shot" at establishing a rule of law in the Ninth Circuit contrary to that established in this case.

As noted, the greatest potential for prejudice to a litigant whose appeal is dismissed is from the potential preclusive effect that adverse *factual* determinations might have in future litigation. No such risk exists in this case, however, because the decisions below address solely a legal issue – whether the new value principle permits

equity holders to retain an interest in the debtor by contributing new value. Moreover, this most definitely is not a case where a party would be bound by findings in a lower court decision without ever having had an opportunity for appellate review. In this case, U.S. Bancorp's claims have been heard by *three* separate tribunals prior to this Court's granting of certiorari, the case having started its way through the federal system in the Bankruptcy Court. *See Manufacturers Hanover*, 11 F.3d at 384-85 (rejecting request for vacatur because appellant had at least one opportunity for appellate review). That U.S. Bancorp may be denied an opportunity to have further review by the Court only places its case on par with the vast majority of cases for which the Court denies review on petition for certiorari. *See* Petr. Brief 32 (citing U.S. Law Week report that nearly 90% of all "paid" certiorari petitions coming before the Court during the last three terms have been denied, dismissed, or withdrawn).

Contrary to U.S. Bancorp's assertion, Bonner Mall is no more responsible for this case becoming moot on appeal than is U.S. Bancorp. *See* Petr. Brief 40-41. Both parties agreed to a settlement in concept on January 7, 1994, *three days before this Court granted certiorari*. If the settlement had become effective on that date, this Court could not have granted certiorari, and the decisions below most likely could not have been vacated under any circumstances. *See* S.G. Brief 8 n.6. The settlement did not become effective on that date, however, because U.S. Bancorp demanded an opportunity to perform additional "due diligence" before Bonner Mall could obtain bankruptcy court approval of the Consensual Plan. During the entire period ending with confirmation of the Consensual

Plan on March 10, 1994, both U.S. Bancorp and Bonner Mall were willing and able to proceed before this Court in the event no settlement could be consummated.

U.S. Bancorp's real agenda in trying to have the Ninth Circuit's opinion vacated is its concern about the precedential effect of an opinion in the Ninth Circuit that could be relied upon by bankruptcy courts to confirm new value plans of reorganization in other cases. Thus, this *is* a case in which a former litigant is " 'dissatisfied with the decision of the [lower] court'" and is attempting to use the settlement as a means to have an unfavorable precedent " 'wiped from the books.'" *See* S.G. Brief 27 (quoting *In re United States*, 927 F.2d at 628). U.S. Bancorp's open attempt to manipulate legal precedent should fail.

The decision below has settled an important question of bankruptcy law in the Ninth Circuit. As set forth in Bonner Mall's brief on the merits and the briefs of amici curiae filed in support thereof, the Ninth Circuit's opinion is consistent with both the Bankruptcy Code's plain language and with pre-Code decisions of the Court. Whether or not the Court ultimately will agree with the Ninth Circuit's conclusions on the new value principle, the Court has recognized the societal value of resolving a difficult legal question. *See Payne v. Tennessee*, 111 S. Ct. at 2609. For at least the time being, creditors and debtors in the Ninth Circuit need not devote countless hours to litigating the merits of the new value principle, as did the parties in this case. By allowing the Ninth Circuit's decision to stand, this Court can relieve the bankruptcy courts of that circuit from needless litigation on a settled question of law. In light of the importance of preserving

the lower courts' decisions in this case and the lack of cognizable prejudice to U.S. Bancorp if the decisions remain as valid precedents, the Court should decline U.S. Bancorp's request for vacatur.

CONCLUSION

The Court should dismiss this case as moot without vacating the decisions of the courts below.

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